

#04-7984

P.C. 8400139

From: Vanessa Ellermann <vge@cullenlaw.com>
To: "wvogl@samhsa.gov" <wvogl@samhsa.gov>
Date: 7/12/04 5:58PM
Subject: OOIDA Comments, Docket Number 04-7984

Dear Mr. Vogl:

Attached are Comments of the Owner-Operator Independent Drivers Association, Inc. in response to the notice of proposed revisions to mandatory guidelines (Docket No. 04-7984). Please contact me if you have any problems opening this attachment. Thank you.

Sincerely,

Vanessa G. Ellermann

<<Comments of OOIDA In Re Notice of Proposed Revisions to Mandatory Guidelines.pdf>>

BEFORE THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO NOTICE
OF PROPOSED REVISIONS TO
MANDATORY GUIDELINES

[Docket No. 04-7984]

JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.

PAUL D. CULLEN, SR.
PAUL D. CULLEN, JR.
VANESSA G. ELLERMANN
The Cullen Law Firm, PLLC
1101 30th Street, N.W.
Suite 300
Washington, DC 20007

July 12, 2004

**BEFORE THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

I. INTRODUCTION

A. Procedural Statement

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) in response to the Notice of Proposed Revisions to Mandatory Guidelines by the Department of Health and Human Services (“HHS”). The notice invites comments on its proposal to include alternative specimens to be used for workplace drug testing as well as new testing procedures and technologies.

B. Interest of the Owner-Operator Independent Drivers Association

OOIDA is the national trade association representing the interests of small business trucking professionals in the United States of America. Small business truckers (companies operating six or fewer trucks) comprise over 70% of the motor carrier industry. OOIDA represents more truck drivers and more trucking companies than any other association in the trucking industry. The Association currently has over 112,000 members from all 50 states.

In addition to representing the industry before legislators, government agencies, and the courts, OOIDA advances the interests of its members by developing membership services and programs designed specifically for independent professional truckers. These services and programs that would be difficult or impossible for a sole proprietor or small business owner to create or maintain on their own.

OOIDA believes that illegal drugs have no place in the commercial driving industry. OOIDA offers, among other things, drug testing services through its drug and alcohol testing consortium, and assists truckers in complying with the laws and regulations regarding mandatory drug and alcohol testing. Services provided by the drug and alcohol testing consortium include the following: random drug and alcohol tests; post-accident, pre-employment, return-to-duty, and follow-up drug screens and alcohol tests; access to a nationwide network of collection test sites; medical review officer services; test labs; complete record keeping; and educational training.

The Omnibus Transportation Employee Testing Act requires the Department of Transportation (“DOT”) to incorporate the HHS drug testing guidelines and amendments to them into DOT testing procedures. Therefore, the adoption of these rules could have a significant impact on the professional truck driver, including most members of OOIDA.

II. SUMMARY

OOIDA is adamantly opposed to implementation of the new HHS drug testing proposals. The proposal cannot be justified under the law, the facts, or sound principles of public policy. HHS admits in the proposal that the new tests are unreliable. Yet, the proposal lacks adequate constitutional due process safeguards in light of the admitted uncertainties. Unreliable tests do nothing to further the public policy interest of keeping dangerous commercial drivers off our highways. OOIDA believes that the purported advantages of alternative specimen testing will never outweigh the harm that would be done to the constitutional and privacy rights of the individual if such a program is allowed to go forward as proposed.

Truck drivers lose their jobs when a single drug test indicates that they are

using illicit drugs. With the livelihoods of hundreds of thousands of hardworking Americans at stake, workplace drug testing should at least meet the same reliability standards that the testing of urine specimens has offered for the past two decades. At this juncture, alternative specimens fail to meet the reliability standards because the state-of-the-science is currently insufficient.

HHS acknowledges “serious concerns,” “suspected limitations,” “known limitations,” “incorrect results,” and “conflicting studies” related to alternative specimen technologies. To implement a drug testing program that is rife with these problems would inevitably invite due process challenges as well as race and gender discrimination claims.

For this reason, the drug testing proposal should be withdrawn in its entirety until HHS defines and fully develops the science surrounding the new alternative specimen technologies.

III. COMMENTS

A. The Proposed Revisions Are Unconstitutional

The United States Supreme Court held in *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602 (1989) that pre-employment drug tests are searches within the meaning of the Fourth Amendment when performed by public employers, and must satisfy the Fourth Amendment’s reasonableness requirement. Compulsory drug tests performed pursuant to federal regulations qualify as searches and must be reasonable under the Fourth Amendment. See *Alverado v. Washington Public Power Supply System*, 11 Wash. 2d 424 (1988).

Determining whether drug tests of employees in public safety-related jobs are reasonable requires a balancing of the need to search against the invasion of the individual which the search entails. *See Dozier v. New York City*, 130 A.D.2d 128 (1987).

Additionally, courts have looked to the manner in which the testing is conducted in determining reasonableness; i.e., whether sufficient notice is given, whether the job is related to public safety (as opposed to cost or efficiency), whether the results are kept confidential, whether the employee has a right to respond to failed tests, whether the testing is done as part of a routine or required medical examination for new applicants, and the testers' duty to disclose results to the tested employee.

In *Alverado*, the court gave more specific criteria for determining constitutionality of a drug testing program in pervasively regulated industries:

- (1) There must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made;
- (2) The warrantless inspection must be necessary to further the regulatory scheme; and
- (3) The program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

The government interest in *Alverado* was to ensure that personnel were fit for duty. Second, the warrantless searches were necessary to further public safety interests. Finally, the *Alverado* drug testing program contained adequate substitutes for a warrant which included the following:

- (1) Prospective employees were notified well in advance that drug tests would be necessary;
- (2) The scope of the search was limited to a nonwitnessed urine sample collected in a

medical facility;

(3) Results were kept confidential;

(4) The program provided for re-testing if an applicant tested positive;

(5) The results were used for the sole purpose of determining fitness for duty;

(6) The only consequence of a positive test was that the prospective employee would not be considered for employment for six months; and,

(7) The investigating officers had little, if any, discretion since all prospective employees were tested.

Here, as in *Alverado*, the government interest in drug testing is to ensure that transportation industry personnel are fit for duty. However, underdeveloped, unreliable, and unscientific alternative specimens testing proposals would have no effect on furthering public safety interests. What is more, the HHS drug testing proposal does not contain any adequate substitutes for a warrant. The HHS proposed revisions allow racial bias in testing, stigma to those being tested (through use of a sweat patch), and approval of equipment with a known wide margin of error (POCT equipment).

Comparing the *Alverado* substitutes for a warrant, the HHS drug proposals give employees very little notice and would require them to wait for extended periods. The procedures would allow direct observation of a urine sample collection by a person of opposite gender. The proposals fail to address issues with the confidentiality of test results. Hair testing is overly broad in testing fitness for duty since drug use can be detected long after the effects are gone. Truck drivers would not only lose their jobs if tested positive, but would also have difficulty finding any job in commercial driving. POCT testing would place broad discretion in non-medically trained personnel.

Further, the HHS drug testing proposals fail to include a complete cost and burdens analysis accompanied by a statement of how the procedures are rationally related to furthering public safety. The drug testing proposal completely ignores individual due process rights and clearly falls far short of passing constitutional muster.

HHS needs to address these matters in order to protect employers, laboratories, manufacturers and suppliers of testing equipment, medical personnel, and all other persons and entities involved in the drug testing industry against well-founded legal claims.

B. “Three Serious Concerns”

HHS notes “three serious concerns” regarding data from the pilot program which was designed to test the credibility, precision, accuracy, and reliability of alternative specimens drug testing (p. 19674). First, not all laboratories have developed the capability to test for all required drug classes or perform such tests with acceptable accuracy. Second, some drug classes are more difficult to detect than others, for any given specimen. Third, the drug classes that are difficult to detect vary by specimen type. This requires “special awareness” or discretion in selecting the appropriate specimen type from a specific donor when use of a specific drug is suspected (p. 19675).

With these “serious concerns” left unresolved, laboratories simply cannot perform as required for implementation of alternative specimen tests. Until scientific evidence shows that the proposed testing can produce achievable and sustainable results, the HHS proposals do not meet the *Alvarado* test for certainty and regularity necessary as a substitute for a warrant.

C. Racial Bias for Hair Testing

A majority of studies on hair testing show that drugs appear more concentrated in dark hair than in light hair, given equal dosing. As Kenneth C. Edgell stated in his comments submitted to this proceeding, “To propose a test method with such an issue hanging over it is unfathomable.” FR Doc. 04-7984, p. 5. Such discrimination will, undoubtedly, result in subsequent, lengthy litigation. This reason alone justifies withdrawal of the proposal to include hair testing.

However, there are additional problems with hair testing:

- (1) The effect of hair color/dye or chemically-altered on the amount of drug present is unknown;
- (2) The proposal fails to address alternatives if test subject is bald, has a hair weave, dreadlocks, or a hair transplant;
- (3) Sweat on the hair can result in inaccuracies; and,
- (4) Hair testing is not effective and overly broad for post-accident or return-to-work tests since drugs can be detected long after the effects of the drug have subsided.

Clearly, allowing hair specimens for workplace drug testing is unfair, inappropriate, and unconstitutional.

D. Oral Fluids Testing Is Unreliable and Substantially Increases the Cost of Drug Testing

The collection of an oral fluid specimen for drug testing is considered less invasive than the collection of a urine sample. Also, oral fluid is readily accessible. HHS failed to note, however, that these advantages would be cancelled out by the required collection of a urine sample at the same time the oral fluid specimen is obtained.

HHS reasons that a urine sample should be collected and tested subsequent to a positive oral fluid test result for marijuana to “protect workers from incorrect test results” because oral fluid tests actually introduce greater opportunity for inaccuracy. Oral fluid testing cannot accurately differentiate between drug use and environmental contamination and specimens are easily diluted.

The procedures for oral fluid testing, if implemented, would substantially increase the cost of drug testing as well as the time it takes to administer the test and receive test results. There appears to be absolutely no benefit to oral fluid testing when compared to the relative cost and reliability of urine testing procedures already in place.

Truck drivers lose money every day that they are not behind the wheel of a truck. Considering the increased cost and time required for oral fluid testing, together with the potential for inaccurate test results, allowing oral fluid testing is premature, and clearly unjustified. These problems prevent oral fluids testing from meeting constitutional due process requirements.

E. Sweat Testing Is Not Fully Developed

HHS acknowledges that: (1) “incorporation of drugs into sweat is poorly understood;” (2) “contamination issues continue to be of concern;” (3) only one commercially available sweat patch has been approved by the FDA; (4) the sweat patch may cause a rash in some individuals; (5) the sweat patch must be worn continuously for a few days, the removal of which HHS claims is “usually visible to personnel trained to remove them;” and (6) the patch may cause stigma to wearers. For these reasons, sweat patches should not be used for workplace drug testing until these concerns have been fully resolved. Balancing the potential stigma and possible allergic reactions to

individuals tested against concerns about contamination and tampering, the privacy impact on the individual far outweighs the need to test sweat.

F. Point Of Collection Testing (“POCT”) Is Unworkable

According to the HHS proposal, a POCT device need only be 80% accurate to be SAMHSA-certified. Such a low reliability rate has never been acceptable in any federal-testing program. See FR Doc. 04-7984, p. 9. HHS fails to articulate any rationale for requiring a lower standard of reliability for POCTs than for laboratories. With a 20% chance of a false positive result, many drug-free truckers would be forced to stop work and wait for a second test, losing valuable time and money.

Collectors are generally considered the “weakest link” in the current urine-testing program, but laboratory-based testing provides accountability since it involves a system of checks and balances. POCT testing would place sole responsibility of drug testing in non-medically trained collectors, with no accountability whatsoever. See FR Doc. 04-7984, p. 10. Moreover, collection errors would significantly increase given the added complexity of collecting different specimen types. For these reasons, POCT testing procedures fail to provide constitutional safeguards required for implementation.

G. The Interrelationship of Cutoffs for Different Specimens is Unknown

Cutoffs included in the HHS drug testing proposal are not based on scientific studies or experiments. Rather, they were proposed by industry working group recommendations. As such, the entire testing program is “subject to justified charges that its operation is wholly arbitrary.” FR Doc. 04-7984, p. 3. For example, a truck driver could test negative with a urine sample, then test positive with hair specimen testing two

months later, with no drug impairment at the time of either test. There is no rational policy basis for such a testing scheme.

H. The Proposed Revisions Requires More Time and Money

The HHS proposal requires consultation with an appropriate contact from a federal agency when a problem occurs during the collection of one type of specimen. What happens when an appropriate contact from the agency is unavailable? Would a truck driver away from home be required to wait until somebody answered the phone? Is HHS proposing a 24-hour per day telephone hotline to address such issues? If not, would a truck driver be considered as having refused a test if he leaves the facility because no federal office answers the phone?

The HHS proposal requires additional testing equipment, additional training for collection site personnel, additional certification for laboratories, and regular laboratory audits. The costs for these requirements are enormous. HHS has not done a cost analysis of the proposed drug testing guidelines. Additionally, the HHS burdens analysis greatly underestimated the potential impact because the analysis failed to include all transportation workers. Without such an analysis, the proposal is incomplete. Balanced with the few advantages the proposed drug testing provides, if any, these costs are obviously unwarranted.

OOIDA suspects that the new drug testing proposals are driven by vendors who stand to gain economically from the adoption of these proposals, but have no genuine concern for furthering public safety objectives. Introducing unreliable tests, together with procedures that violate due process, places the integrity of the drug testing process in jeopardy and is sure to invite constitutional and other legal challenges.

IV. CONCLUSION


OOIDA strongly believes that illegal drugs have no place in the commercial vehicle workplace. The current urine-testing program had problems when it was first introduced, but after working through them for some time, a reasonably accurate system has been achieved. Many of the problems that existed in the current system when it was first introduced two decades ago have been settled. It simply makes no sense to introduce a whole new set of problems at this time. No rational public policy reason has been advanced to support these guidelines. While the potential of adulterated urine specimens is inherent in the current urine-testing program, introducing alternative specimens will only create more ways for drug users to manipulate the system.

OOIDA strongly opposes the implementation of the drug testing procedures allowing alternative specimen testing, POCT testing, and other new technologies, methodologies, and requirements proposed by HHS. The state-of-the-science surrounding alternative specimen testing is clearly insufficient to protect our members from unreasonable searches. The notice should be withdrawn in its entirety.

Thank you for your consideration of these comments.

JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.

July 12, 2004



PAUL D. CULLEN, SR.
PAUL D. CULLEN, JR.
VANESSA G. ELLERMANN
THE CULLEN LAW FIRM, PLLC
1101 30th St., N.W.
Suite 300
Washington, D.C. 20007
(202) 944-8600